Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) Communications Act of 1934	)	WT Docket No. 97-~~197~~
	)	
Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation	)	ET Docket No. 93-62
	)	
Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules to Preempt State and Local Regulation of Commercial Mobile Radio Service Transmitting Facilities	)	RM-8577

97-1921

To: The Commission

COMMENTS OF AMERITECH MOBILE COMMUNICATIONS, INC.

Ameritech Mobile Communications, Inc. (Ameritech), by its attorneys, hereby submits its comments on the preemption rules proposed in the Commission's Second Memorandum Opinion and Order and Notice of Proposed Rulemaking (SNPRM) in the above captioned proceeding, FCC 97-303, released August 25, 1997. As discussed below, Ameritech strongly supports the Commission's proposal to delineate at the Federal level what steps can be taken by state and local governments to verify the compliance of FCC licensees with the Commission's RF exposure standards. However, it is vital that the Commission clarify that licensees which are categorically exempt from performing routing environmental evaluations need not

0+10

provide state and local governments with detailed compliance showings. Instead, these entities should merely be required to state the grounds for their exemption. It is also important that the Commission establish itself as the sole arbiter of whether the licensee's showing is sufficient. Finally, Ameritech supports the Commission's proposal to extend these restrictions to non-government entities, such as homeowners associations.

I. The Commission Should Carefully Limit The Extent of State and Local Inquiries Into RF Compliance.

The Commission seeks comment on proposed procedures for filing and reviewing requests pursuant to Section 332(c)(7)(B)(iv)-(v) of the Communications Act of 1934, as amended (the "Communications Act") for relief from state or local regulations on the placement, construction or modification of personal wireless service facilities based either directly or indirectly on the environmental effects of RF emissions. In the Telecommunications Act of 1996 ("Telecom Act"), Congress gave the Commission authority to grant relief from state or local regulations of personal wireless service facilities based on the environmental effects of RF emissions to the extent that the facilities in question comply with the Commission's rules regarding such emissions. Ameritech agrees with the Commission that clear procedures must be developed that will allow parties adversely affected by actions or regulations based on RF emissions to petition for relief. The Commission seeks to balance the legitimate role of state and local authorities in

zoning and land use matters with the statutory goal of promoting fair competition in the provision of personal wireless services without compromising public health or safety. Ameritech does not dispute the important role played by state and local governments in land use decisions. However, RF regulation constitutes an area where there is simply no room for conflicting state standards. The issues are quite complex, as demonstrated by the captioned proceeding. Compliance with the RF standards will require the expenditure of substantial resources by the wireless industry. Given the very competitive nature of this industry, it is important that Commission licensees have a single, clearcut standard to follow in achieving compliance. This can only be accomplished if a comprehensive policy is developed and enforced at the Federal level. Otherwise, licensees will find themselves subject to numerous conflicting interpretations by state and local governments, making compliance an expensive and frustrating venture, fraught with undue risks of liability.

The Commission poses certain definitional issues that must be resolved before it can adopt a review procedure. First, the Commission needs to define what constitutes a "final action" or "failure to act," which would trigger the right of review. The SNPRM proposes to define "final action" as an adverse decision by the zoning board or commission. It is respectfully submitted that this definition is too restrictive, because it appears to require licensees to go through a potentially lengthy and expensive zoning

hearing before starting the Federal review process. Instead, the Commission should allow challenges to unduly restrictive ordinances as soon as they are adopted by State or local governments (i.e, a "facial" challenge). If an ordinance is neutral on its face but is being interpreted in an improper way by, e.g., a zoning board, then it may be appropriate for the licensee to complete the local hearing process before complaining to the Commission. However, where the ordinance contains objectionable provisions on its face, it is counterproductive to require a series of hearings and appeals at the local level before the Commission grants relief.

The Commission proposes to define "failure to act" as a delay beyond the "usual period" taken by a zoning commission in acting on such matters. While Ameritech realizes that this definition is based on the legislative history of the Telecom Act, it is respectively submitted that the Commission should prescribe specific benchmarks, based on a survey of the usual length of zoning proceedings before adoption of the new RF standards last year. Otherwise, there is room for abuse by governmental entities that seek to gain leverage in a proceeding by letting a licensee's bona fide antenna siting proposal wither on the vine.

The Commission also seeks to define when a State or local action should be preempted because it only partially or indirectly concerns RF regulation. The Commission proposes a case-by-case approach, and also asks whether it should preempt such actions by

non-governmental entities, such as homeowners associations. Ameritech supports the Commission's proposal to preempt actions which partially or indirectly concerns RF radiation. As shown in the January 3, 1997 letter of the Cellular Telecommunications Industry Association (CTIA) of the Commission, and the January 13, 1997 response of then-Chief of the Wireless Telecommunications Bureau Michelle Farquhar, licensees are already encountering instances of restrictive state actions which are not overtly based on RF considerations, but which were clearly motivated by RF concerns. Ameritech also supports the preemption of actions by non-governmental entities such as homeowners associations. It would defy logic to allow such associations to create impediments to the important Federal objectives which are protected by Section 332(c) of the Communications Act.

II. Categorically Exempt Licensees Should Not Be Required To Make Detailed Compliance Showings.

Because State and local governments are preempted from RF regulation only to the extent that facilities comply with the Commission's Rules, the Commission proposes to allow State and local entities to require licensees to demonstrate such compliance. In this regard, the Commission proposes two alternative approaches: Under the first approach, categorically exempted licensees would only be required to certify their compliance to the local government; and other licensees, or applicants, would be required to provide the state with any showings concerning RF compliance which they filed with the Commission. The second alternative would

require categorically exempt licensees to make a more detailed showing of compliance to the local government. Surprisingly, the Commission describes this showing as involving a demonstration that the MPE limits will not be exceeded, "by calculational methods, by computer simulations, by actual field measurements, etc." SNPRM at paragraph 146.

Pending resolution of this proceeding, the Commission has announced at paragraph 145 of the SNPRM that it is adopting the second (and more burdensome) alternative as its interim policy for passing judgment on State and local regulations, effective immediately. Ameritech is concerned that, in the absence of the clarifications described below, this action will result in immediate state and municipal demands for unduly burdensome compliance showings.

It is respectfully requested that the Commission should adopt its first proposed alternative as both the interim policy and as the permanent standard, because the requirement for categorically exempt licensees to simply certify their compliance is a reasonable one which will allow the prompt resolution of state and local zoning issues related to RF considerations.

If the Commission were to use the second alternative as either the interim standard or the permanent rule, this alternative must be clarified with respect to the compliance showings required of

categorically exempt licensees. The SNPRM seems to suggest that categorically exempt licensees may be required to provide state and local governments with (1) a statement of compliance with both the general population/uncontrolled exposure limit and occupational/controlled exposure limit standards; (2) an explanation of how compliance was determined, including "calculational methods, computer simulations, actual field measurements;" (3) a detailed explanation about restrictions on access to the antenna site and control procedures for workers that may visit the site; and (4) an evaluation of "other significant transmitting sources" located at or near the transmitting site. Id. at paragraph 146. However, categorically exempt licensees are not supposed to be responsible for such calculations or measurements. If they must perform these tests for local government, any benefit from being categorically exempt will be lost!

The Commission must clarify that categorically exempt licensees need only provide the local governmental entity with a simple statement that they are exempt because, *e.g.*, their power is below 1,000 watts effective radiated power (ERP), or their antenna is on a tower greater than ten meters above ground level, or they are a private radio licensee. In contrast, the more detailed showings described by the Commission may be appropriate for licensees that are not categorically exempt, but which have performed a routine environmental evaluation and have achieved

compliance by, *e.g.*, restricting rooftop access or raising their antenna. It is vital that the Commission clarify this aspect of its proposal. If categorically exempt operations must perform the detailed evaluation seemingly reflected in the Commission's second alternative, paging and cellular licensees will have to expend the time and resources needed to evaluate thousands of transmitters, even though Rule Section 1.1307(b)(1) states that these facilities "are categorically excluded from making such studies or preparing an EA [environmental assessment]..."

Whichever option is adopted, the Commission must make it absolutely clear that any showings provided to the State or local agency are for informational purposes only, and that the Commission alone can pass judgment on whether the showings satisfy the Commission's Rules. Otherwise, licensees will have to satisfy dozens of different interpretations as to what constitutes compliance, and the Commission will become embroiled in a morass of litigation over the meaning of its rules. State or local interpretation of compliance with Federal standards would also improperly usurp the Commission's exclusive jurisdiction over RF regulation.

The Commission also seeks comment on limiting participation in the Commission's review process of State and local actions to "persons adversely affected by" the ordinance or regulation. SNPRM at paragraph 150. Ameritech agrees that reasonable limits should

be placed on the potential participants in relief proceedings. However, it is vital that the Commission maintain the ability of industry organizations, such as CTIA and the Personal Communications Industry Association (PCIA), to participate in these proceedings. These organizations may or may not pass the traditional "persons adversely affected" test, but they can provide the Commission with valuable resources and analysis, to help ensure uniformity among jurisdictions and even-handed Commission rulings. The participation by these organizations will also help smaller licensees to vindicate their rights, when these licensees would otherwise lack the resources to oppose the adverse state or local action. These organizations thereby further the Congressional mandate (reflected in Section 309(j) of the Communications Act) that the Commission facilitate the participation of small businesses in the provision of advanced telecommunications services.

Finally, Ameritech supports the Commission's proposal (SNPRM at paragraph 151) to use a rebuttable presumption that its licensees are in compliance with the Commission's RF guidelines. Again, it is important that the Commission allow categorically exempt licensees to demonstrate that they are entitled to this presumption by simply showing that they, e.g., propose facilities with less than 1,000 watts ERP or sufficient antenna height to qualify for the exemption.

CONCLUSION

In light of the foregoing, it is respectfully submitted that the Commission should adopt its proposed restrictions on state and local evaluation of RF compliance, with the clarifications discussed above.

Respectfully submitted,

AMERITECH MOBILE SERVICES, INC.

By: Dennis L. Myers/JP

Dennis L. Myers, Vice President
and General Counsel
Ameritech Cellular Services
2000 West Ameritech Center Drive
Location 3H78
Hoffman Estates, Illinois 60195
Tel. (847) 765-5715

John A. Prendergast
Blooston, Mordkofsky, Jackson & Dickens
2120 L Street, Suite 300
Washington, DC 20037
Tel. (202) 659-0830
Its Counsel

Filed: October 9, 1997